Statutory Right of User Imposed for Landlocked Land

The decision of McMurdo J in *Pacific Coast Investments Pty Ltd v Cowlishaw* [2005] QSC 259 concerned an application under s 180 of the *Property Law Act 1974* (Qld) for a statutory right of user.

Facts

The applicant purchased land with a two storey commercial building built along the only street frontage. At the time of purchase, there was no car park on the land. Some time later, the applicant constructed a car park on part of the land behind the building. The construction of the car park required the use of the neighbouring respondent's driveway for access. It was found by McMurdo J that the respondent took no objection to the construction of the car park and the use of her driveway for that construction. Nor did the respondent object to the applicant's laying some further concrete on the respondent's land, so that the applicant's car park was merged with the concrete area at the rear of the respondent's building. The respondent did not suggest that, as all this was happening, she believed that the applicant had in mind some other access to its car park.

After construction of the car park, the applicant's tenant used the respondent's driveway to gain access to the car park. This was because vehicles could not reach the car park from the applicant's street frontage as the building extended across the entire width of the applicant's land. Notwithstanding that this had been happening for some years, the respondent's tenant finally took objection to the use of the driveway by the applicant's tenant, triggering the need for this litigation.

The applicant sought a right of way for vehicles to travel on the respondent's driveway to and from the applicant's land. The application was made pursuant to s 180 of the *Property Law Act 1974* (Qld).

Section 180

Section 180 provides, in part, as follows:

(1) Where it is reasonably necessary in the interests of effective use in any reasonable manner of any land ("the dominant land") that such land, or the owner for the time being of such land, should in respect of any other land ("the servient land") have a statutory right of user in respect of that other land, the court may, on the application of the owner of the dominant land but subject to this section, impose upon the servient land, or upon the owner for the time being of such land, an obligation of user or an obligation to permit such user in accordance with that order.

…

(3) An order of the kind referred to in subsection (1) shall not be made unless the court is satisfied that- -

(a) it is consistent with the public interest that the dominant land should be used in the manner proposed; and

(b) the owner of the servient land can be adequately recompensed in money for any loss or disadvantage which the owner may suffer from the imposition of the obligation; and

(c) either- -

(i) the owner of the servient land has refused to agree to accept the imposition of such obligation and the owner's refusal is in all the circumstances unreasonable; or

(ii) no person can be found who possesses the necessary capacity to agree to accept the imposition of such obligation.

Decision

McMurdo J ordered that the applicant be granted a statutory right of user over the respondent's driveway in exchange for payment of compensation in the sum of $80,000. In arriving at this decision, McMurdo J needed to consider certain key aspects of the operation of s 180 which are encapsulated in the questions and answers that follow.

What significance should be attached to the fact that the land was landlocked when purchased by the applicant?

Although the applicant undoubtedly bought the land knowing the location of the building was such as to prevent any vehicular access to the rear of the land, except through another property, this was not fatal to an application under s 180. The fact that the applicant was seeking to use the land in a manner which was not possible when the applicant purchased the land and the fact that this was being done for a perceived commercial advantage were not necessarily considerations adverse to the application.

Was it relevant that use could be made of the applicant's land without any use of the car park?

Although previous tenants had managed without on-site parking, an applicant for a right of user under s 180 does not have to demonstrate that each and every use of its land is one for which the obligation of user is reasonably necessary. Rather, an applicant is entitled to point to a particular use and seek to make its case in relation to that particular use alone. Subject to the terms of the section itself, McMurdo J opined that it was a proper purpose of s 180 to facilitate a new or further use of the land.

Was the proposed use a use in a reasonable manner of the land?

McMurdo J was satisfied that this requirement was clearly satisfied. The application was based upon what was the present use of the applicant's land, namely, a commercial building with its car park at the rear.

What relevance (if any) should be attached to the fact that access to the applicant's carpark could equally have been sought over another adjoining property?

For the respondent it was argued that it was not reasonably necessary to use its driveway, as the applicant could use a driveway serving a home unit building next door to the respondent's land. McMurdo J noted that the proposition underlying this submission seemed to be that where it is reasonably necessary for the effective use of the dominant land that there be an obligation of user imposed upon one of two possibilities as the servient land, then s 180(1) cannot be satisfied in relation to whichever possibility the applicant selects by its application. McMurdo J rejected this proposition referred with approval to the observation of Hamilton J in *Tregoyd Gardens Pty Ltd v Jarvis* (1997) 8 BPR 15, 845 in relation to a similar submission:

> It cannot be the intention of the Act that if an easement would be equally efficacious over two pieces of land it cannot be granted over either because it cannot be said that it is necessary for it to be granted over *that* piece of land as opposed to the other.

Section 180(3) considerations

Was it consistent with the public interest that the dominant land be used in the manner proposed?

McMurdo J was untroubled in finding that this requirement was satisfied. By providing car parking within its own site, the applicant was serving the public interest by reducing the demand for street parking in an area where such parking was already at a premium.

Could the respondent be adequately recompensed for the loss or disadvantage suffered from the imposition of the obligation?

For the respondent, it was argued that it was a requirement that the applicant adduce evidence of the value of its land and the effect of the right of user, if granted, upon that value. McMurdo J rejected this submission. For the purposes of s 180(3)(b) the issue is one of compensation for a loss or disadvantage to the owner of the servient land, for which the impact on the value of the dominant land is irrelevant. As to the loss or disadvantage suffered, McMurdo J accepted valuation evidence that the value of the respondent's land would be diminished by about $80,000 due to the negative impact that the right of user would have upon potential tenants of the respondent's commercial premises.

Was the respondent's refusal to agree to accept the imposition of an obligation of user unreasonable?

The applicant had offered to pay the respondent the sum of $30,000 as consideration for the easement by the time these proceedings were commenced. For the respondent it was argued that because that consideration was inadequate, it was not a reasonable offer and she had not unreasonably refused to agree to the easement at what the respondent submitted was the critical time: the commencement of the proceedings.

Again, McMurdo J rejected this submission as misconstruing the statutory provision. The preconditions to the exercise of the power under s 180 must exist when the power is exercised; they need not have existed when the proceedings were commenced:

> By the conclusion of the hearing, the applicant had made it clear that it sought an order for the imposition of an obligation of user upon condition that it pay such amount as was assessed to be just compensation or consideration pursuant to subs (4)(a). In particular the applicant made it clear that if the amount of $80,000, derived from the respondent's valuation evidence, was considered to be just compensation, the applicant sought an order upon condition that that amount be paid. And the respondent made it clear, by the many submissions on her behalf as to why no order should be made, that she refused to agree. Accordingly, the only question under subs (3)(c) is whether that refusal is in all the circumstances unreasonable. I conclude that it is. The respondent can and will be adequately compensated. The exercise of the applicant's rights under the proposed easement, consistently with the terms of the easement, should occasion no difficulty. I can see no rational basis for the respondent's refusal, and that view is fortified by the fact that the respondent was clearly content at some stage to have this car park constructed in a way in which it was going to be linked to the street by her driveway. And I am persuaded that there has been nothing in the events since the driveway was used for the car park which would provide any reasonable basis for the respondent's refusal. At [25]

Comment

This decision provides useful guidance concerning a number of issues that will be commonly encountered when an application is made under s 180 of the *Property Law Act 1974* (Qld). As evidenced by the result in this instance, although the courts will be mindful that a respondent's valuable property rights are not to be interfered with lightly, there remains an interest in landlocked land being utilised.

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